PART II: WHITE-COLLAR CRIME

CHAPTER 4

UNDERSTANDING (AND RESPONDING TO) "CARBON COPY PROSECUTIONS": AN ANTICORRUPTION PHENOMENON THAT IS HERE TO STAY *

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I. INTRODUCTION

One emerging trans-national trend we have tracked for some time – and first wrote about in 2012 – is the phenomenon of "carbon copy prosecutions." Stripped to its core, when we first developed the term "Carbon Copy Prosecution" back in 2011,[1] we described the following: "When foreign or domestic Jurisdiction A files charges based on a guilty plea or charging document from Jurisdiction B." Since that time, the term has gained considerable currency; countless of law firm client updates now regularly report on instances of carbon copy prosecutions, and most recently Deputy Attorney General Rod Rosenstein spoke about it in virtually identical terms: "One concern is about multiple law enforcement and regulatory agencies pursuing a single entity for the same or substantially similar conduct."[2]

The old (indeed, by contemporary legal standards perhaps "ancient") days of one-dimensional government investigations appear to be over. We will explain why duplicative, serial enforcement actions are now part and parcel of the enforcement landscape, despite a healthy ongoing debate over the need for, and fairness of, serial enforcements. Carbon copy prosecutions have already left their seemingly permanent mark and have joined the international vernacular dealing with cross-border corruption matters. Our prediction is that, as globalization continues to shrink the world, carbon copy prosecutions will continue to increase in frequency, size, scope, and force. Simply stated, carbon copy prosecutions are here to stay.

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[1] Boutros coined the term "carbon copy" prosecutions during a presentation he and Funk delivered in Toronto, Canada in the summer of 2011. *See* Juliet S. Sorensen, *The Globalization of Anti-Corruption Law*, FCPA Professor Blog (Aug. 16, 2011), online at http://www.fcpaprofessor.com/2011/08/page/3 (summarizing the 2011 ABA Annual Meeting Presidential Showcase Panel, which included the authors, and noting Mr. Boutros's coining of the term "carbon copy" prosecutions).

[2] Available at http://fcpaprofessor.com/fcpa-relevant-deputy-ag-rosensteins-concern-multiple-law-enforcement-regulatory-agencies-pursing-single-entity-conduct/.

A. Carbon Copy Basics

On occasion, a company will reach a negotiated resolution with U.S. authorities on international bribery-related charges—whether through a non-prosecution agreement, a deferred prosecution agreement, or a guilty plea. Although in those cases the U.S. authorities may be perfectly satisfied with the resolution, the authorities in other countries where the bribery (and harm) actually occurred may for good reason not feel vindicated. In those situations, there exists a bona fide risk that the other countries will initiate prosecutions based on the same operative facts as, and admissions arising out of, the U.S. investigation and resolution.

Relatedly, if an individual company officer is even tangentially involved or implicated in a U.S.-negotiated resolution, that officer—even if not named at all in the resolution—now faces the specter of potential criminal charges overseas. The officer, therefore, has a strong incentive to ensure that the resolution does not name him or her and describes the officer's conduct in the most positive light (or at least neutrally).

The net effect of DOJ and SEC FCPA settlement policies is that when a company enters into a negotiated resolution with U.S. enforcers, it is essentially powerless to defend against—much less deny—the factual basis on which the resolution is based. This all but ensures that a company that settles with the DOJ—or both the DOJ and SEC in parallel proceedings—will have little or no choice but to settle with foreign authorities, should such authorities choose to exercise jurisdiction and enforce their corollary anticorruption laws.

A country's incentive to vindicate its own laws, moreover, is not insubstantial, especially when a company or individual has already admitted, in another proceeding (say, in the United States), to violating local law. Accordingly, both named parties and non-parties implicated in a resolution in one country ought to give due consideration to the potential impact of that resolution in another territory, especially in light of recent trends pointing to coordinated multinational cooperation and successive enforcement proceedings.

B. The Halliburton Example

In February 2009, oilfield services giant Halliburton Company settled with U.S. authorities for a then-record-breaking $579 million to put an end to charges that one of its former units bribed Nigerian officials to obtain multibillion dollar contracts to build liquefied natural gas facilities on Bonny Island, Nigeria.[3] The resolution no doubt brought a sigh of relief to those Halliburton executives who had been under investigation but who, at the conclusion of the U.S. probe, had not been criminally or civilly charged. For many of them, however, that relative calm ended on December 7, 2010, when Nigerian anticorruption authorities released a sixteen-count criminal complaint against Halliburton, several related

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[3] Halliburton, Press Release, *Halliburton Announces Settlement of Department of Justice and Securities and Exchange Commission Foreign Corrupt Practices Act Investigations* (Feb. 11, 2009), online at http://s3.amazonaws.com/fcmd/documents/documents/000/001/448/original/halliburton-nigeria-bribery_halprs.pdf?1423020436. The resolution was reached with the following three Halliburton-related entities: (1) Kellogg, Brown & Root LLC (KBR); (2) its parent company, KBR, Inc; and (3) Halliburton Company ("Halliburton"), which was the former parent company of KBR, Inc. *Id. See also* DOJ, Press Release, *Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine* (Feb. 11, 2009), online at http://www.justice.gov/opa/pr/2009/February/09-crm-112.html.

companies, and many of their C-suite executives for conduct that mirrored—and that the companies to a great extent had already publicly admitted to being part of in—the resolved U.S. criminal and administrative cases.[4]

Even more, the announcement garnered worldwide headlines due to its inclusion of former U.S. Vice President Richard Cheney, the one-time Halliburton CEO.[5] Nigerian authorities also sought extradition of the defendants (including Vice President Cheney), invoking its longstanding extradition treaty with the U.S.[6] Within two weeks, Halliburton settled the Nigeria case.[7] But the message sent by the actions of the Nigerian authorities was loud and clear. First, if a corporation reaches a negotiated resolution with U.S. authorities on international bribery-related charges—whether through a non-prosecution agreement, a deferred prosecution agreement, or a guilty plea—there is a bona fide risk that other countries will initiate prosecutions based on the same facts as, and admissions arising out of, the U.S. investigation and resolution. Second, if an individual corporate officer is even tangentially involved or implicated in a U.S.-negotiated resolution, that corporate officer—even if not named at all in the resolution—faces potential criminal charges overseas. The officer, therefore, has a strong incentive to ensure that the resolution either does not name him or her or describes the officer's conduct in the most positive light (or at least neutrally).

II. CARBON COPY PROSECUTIONS

A. Carbon Copy Prosecutions: A New Fixture in the International Enforcement Arena

1. A definition and an explanation of carbon copy prosecutions.

As noted at the outset, we use the term "carbon copy prosecutions" to refer to successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same common nucleus of operative facts. Although they may have been an "emerging" trend in six years ago, today we view carbon copy prosecutions as a seemingly permanent fixture in the equation used to conduct and resolve international anticorruption investigations.

For years—especially during the early gestation period of cross-border corruption enforcement actions—corporate targets concerned themselves primarily with whether they would face liability from *both* the DOJ and SEC for overseas conduct violating the FCPA. However, exposure to liability from a single sovereign is no longer the singular concern. Now, companies and their executives and agents cannot afford to focus exclusively on the enforcement arms of the DOJ and SEC, both acting on behalf of the unitary, monolithic

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[4] *See* Sam Olukoya, *Nigeria Charges Dick Cheney with Corruption* (Tucson Sentinel Dec. 7, 2010), online at www.tucsonsentinel.com/nationworld/report/120710_cheney_corruption/nigeria-charges-dick-cheney-with-corruption/.

[5] *See, e.g., Nigeria Plans to Charge Cheney in Case of Bribery*, N.Y. TIMES, Dec. 3, 2010, at A12.

[6] *See* Caryn L. Trombino, *Nigeria Gets a Piece of the Halliburton Pie* (ABA Criminal Justice Section, Global Anti-Corruption Task Force), https:// www.perkinscoie.com/en/news-insights/nigeria-gets-a-piece-of-the-halliburton-pie.html. The U.S. and Nigeria entered into an extradition treaty on December 22, 1931, which went into effect on June 24, 1935. *See* 47 Stat. 2122 (1931), codified at 18 U.S.C. §§ 3181–96.

[7] *See* Bruce Zagaris, *UK National Pleads Guilty to Nigerian Bribes in KBR Joint Venture and Nigeria Reaches Agreement with Halliburton*, 27 INT'L ENFORCEMENT L. REP. 563 (Feb. 2011).

sovereignty of the United States. Today's international enforcement picture is much more complex.[8]

First, an increasing number of nations are enacting—or at least contemplating—enhanced anticorruption laws. For example, Brazil, China, Russia, Thailand, and the United Kingdom have passed new (or at least "newer") and enhanced anticorruption legislation, while India continues to make headways.[9] Australia, France, Mexico, Indonesia, Jordan, Morocco, Taiwan, and the Ukraine, furthermore, are among those countries also to have recently proposed or adopted anticorruption measures.[10] More importantly for purposes of this chapter, and as more recent foreign enforcement actions demonstrate, more and more nations are actively *enforcing* their own local anticorruption laws. As such, serious consideration must be given to the increasing possibility of successive prosecutions by multiple sovereigns for the same core conduct that gives rise to U.S. liability.

Of course, an important distinction must be made between the theoretical risk of prosecution and a foreign nation's actual, demonstrated willingness to prosecute.[11] To be sure, for years companies and others have known and understood—at least on a theoretical level—that from an international jurisdictional standpoint, an illegal act committed in one nation could give rise to liability in another nation that prohibits the same or a similar act (or conduct facilitating the commission of the illegal act).[12] For example, a bribe paid overseas by a U.S. agent to a foreign official not only offends the FCPA and the U.S. Travel Act,[13] but it

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[8] For example, in addition to civil and criminal liability, wrongdoers face debarment under the World Bank's antifraud and corruption policy. See *World Bank Sanctions Procedures* § 9.01 (World Bank Group Jan 1, 2011), online at http://siteresources. worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf. *See also* Pascale Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of U.S. Suspension and Debarment with the World Bank's Sanctions System*, 2012 U. CHI. LEGAL. F. 195, 227–28 (2012).

[9] *See* PRC Anti-Unfair Competition Law Art. 8 (People's Republic of China 2003); PRC Criminal Law Art 164 and Amend 8 (People's Republic of China 2011) (criminalizing the payment of bribes to non-PRC government officials and international public organizations); *Federal Law On Amendments to the Criminal Code and the Code of Administrative Offences of the Russian Federation to Improve State Anti-Corruption Management*, online at http://eng.kremlin.ru/news/2164 (raising fines to up to 100 times the amount of the bribe given or received with a cap of 500 million rubles, or approximately $18.3 million); Bribery Act 2010, c 23 (UK); Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 FORDHAM L. REV. 493, 494 (2015); Library of Congress, *Thailand: Anti-Corruption Law Penalties Extended to Foreigners*, online at http://www.loc.gov/law/foreign-news/article/thailand-anti-corruption-law-penalties-extended-to-foreigners.

[10] *See* F. Joseph Warin, et al., *2011 Mid-Year FCPA Update* (Gibson Dunn 2011), online at http://www.gibsondunn.com/publications/pages/2011Mid-YearFCPAUpdate.aspx; F. Jospeh Warin, et al., *2017 Mid-Year FCPA Update* (Gibson Dunn 2017), online at http://www.gibsondunn.com/publications/Pages/2017-Mid-Year-FCPA-Update.aspx.

[11] Indeed, the statistics show that foreign enforcements continue to considerably lag behind U.S. enforcement activities. See T. Markus Funk & M. Bridget Minder, *The FCPA in 2011 and Beyond*, 6 Bloomberg L Rep—Corporate and M&A Law at 10 ("[A]lthough the world may, indeed, be … passing more local anti-corruption legislation … its collective zeal to actually enforce anti-corruption laws continues to significantly lag."); TRACE International, *Global Enforcement Report 2016* at 6, online at https://traceinternational.org/Uploads/PublicationFiles/TRACEGlobalEnforcementReport2016_1.pdf (counting 118 U.S. bribery investigations in 2016, almost four times as many as the next country).

[12] *See, e.g.,* David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 493–94 & n. 118 (2009) (identifying and collecting the jurisdictional provisions of at least seventeen countries that are said to "employ broad jurisdiction that could result in an individual or firm facing foreign bribery charges and being subject to prosecution in multiple jurisdictions for the same underlying conduct").

[13] 18 U.S.C. § 1952.

almost certainly violates the local laws where the bribe was paid and accepted. Even more, with the proliferation of extraterritorial provisions in the criminal laws of nations that prohibit international bribery, a single improper payment can trigger liability not only in the U.S. under the FCPA *and* in the country where the bribe took place, but in *every* jurisdiction that claims a codified interest in putting an end to foreign bribery by those that carry on a business, or part of a business, within its territories.[14]

But carbon copy prosecutions do not refer to questions of overlapping jurisdiction among nations, nor does the term implicate hypothetical enforcement opportunities arising out of the quilt-like pattern of overlapping foreign laws that prohibit international bribery. Instead, it describes the real-world, burgeoning—and now here-to-stay—phenomenon of consecutive prosecutions (or at least investigations) in multiple jurisdictions for the same (or similar) underlying conduct.[15] Indeed, two key features of these prosecutions are (1) the *timing* in which often foreign governments bring their follow-on actions and (2) the *subject matter* of these enforcement actions.

Turning from the general to the specific, more recent enforcement trends tell a story of foreign countries initiating largely *similar* (if not nearly identical) foreign proceedings with increased frequency *after* a company has already resolved its FCPA liability with U.S. authorities, whether by way of a non-prosecution agreement, a deferred prosecution agreement, or a guilty plea. In this regard, one organization, the Socio-Economic Rights and Accountability Project (SERAP), has petitioned the Nigerian government to "urgently take steps to seek adequate damages and compensation against multinational corporations who have been found guilty in the U.S. of committing foreign bribery in Nigeria."[16] In fact, in an effort to provide specific, actionable information to the Nigerian government in support of its petition, SERAP identified by name those companies that had already admitted to having committed FCPA violations in Nigeria, yet had received no, or in SERAP's views too little, punishment under Nigerian law.[17] According to SERAP:

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[14] *See* Weiss, *supra* note 12, at 493–94. One such example is the U.K. Bribery Act, which includes a jurisdictional provision that captures within its reach all entities and partnerships that "carr[y] on a business, or part of a business, in any part of the United Kingdom," even if the improper payment itself has no territorial connection to the United Kingdom. Bribery Act 2010, c 23 s 7(5) (UK). *See generally* T. Markus Funk, *Understanding the UK Bribery Act as it Relates to Organizations (Section 7)* (Perkins Coie 2011), online at http://www.perkinscoie.com/files/upload/LIT_11_12FlowChart_UKBriberyAct.pdf.

[15] Carbon copy prosecutions are also to be distinguished from global resolutions across countries, such as the global settlements (or proposed global settlements) involving: (1) Siemens (resolution with United States and Germany); (2) BAE Systems PLC (resolution with the United States and United Kingdom); and (3) Innospec Inc (resolution with the United States and United Kingdom). *See, e.g.,* Claudius O. Sokenu, *2010 FCPA Enforcement Year-End Review*, 43 BNA Sec Reg & L Rep 12 (Mar. 21, 2011) (describing BAE's and Innospec's efforts and tribulations in entering into a global settlement with U.S. and U.K. authorities).

[16] Marcus Cohen, David Elesinmogun, and Obumneme Egwuatu, *Will Nigeria Take Another Bite?*, The FCPA Blog (Aug. 4, 2011), online at http://www.fcpablog.com/blog/2011/8/4/will-nigeria-take-another-bite.html (quoting SERAP's August 2, 2011 petition to Nigeria's Economic and Financial Crimes Commission). *See also* Chinyere Amalu, *Bribery: SERAP Asks EFFC to Seek Damages Against Halliburton, Others* (Leadership Mar. 8, 2011), online at http://allafrica.com/stories/201108031276.html (summarizing SERAP's petition). But as some have observed, "[m]any Nigerians, both those serving in public office as well as those on the street, may not want to pursue multinational corporations already dinged for FCPA violations" because to do so "may scare off foreign companies willing to invest in Nigeria" and lead to "loss of jobs ultimately, *if unintentionally*, punishing the Nigerian people." *See* Cohen, Elesinmogun, and Egwuatu, *Will Nigeria Take Another Bite?* (cited in this note) (emphasis in original).

[17] Amalu, *Bribery: SERAP Asks EFFC to Seek Damages*, *supra* note 16.

> While settlement by Halliburton Co and Kellogg Brown & Root LLC (KBR) in Nigeria has amounted only to U.S. $35 million, the corporation has paid over $727 million in settlement and damages in the US. Similarly, Technip SA has paid $338 million in settlement in the US, but has not paid any damages in Nigeria. Snamprogetti Netherlands BV and ENI SpA paid only $32.5 million in Nigeria, but has [sic] paid $365 million in the US.
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> JGC Corp paid $28.5 million in Nigeria but paid $218.8 million in the United States; MW Kellogg paid no damages in Nigeria, but has paid £7 million in the UK. Also, Julius Berger Nigeria Plc has paid only $29.5 million in Nigeria, while Willbros International has paid over $41 million in the U.S. but has made no payment in Nigeria. Panalpina paid $82 million in US, but no payment has been made in Nigeria. The Royal Dutch Shell Plc has paid only $10 million in Nigeria whereas it has paid $48.2 million in the US.
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> . . . Pride International paid $56.1 million in the U.S. but made no payment in Nigeria; Noble Corp has paid $8.1 million in the U.S. but no payment made in Nigeria; Tidewater Inc has paid $15.7 million in the U.S. but no payment in Nigeria; Transocean Inc made payment of $20.6 million in the U.S. but no payment made in Nigeria; Shell Nigerian Exploration and Production Co. Ltd paid $18 million in the U.S. but no payment in Nigeria; and Siemens AG paid only $46 million in Nigeria, whereas it paid $800 million in the US.[18]

It appears that the Nigerian government in fact has reached settlements with some of the entities identified by SERAP, including for $6 million with Tidewater and $2.5 million with Noble.[19]

Similarly—although with the carbon copy request being directed to U.S. authorities—the highly influential international corruption watchdog organization Transparency International not-so-long-ago asked the DOJ to "examine" Oklahoma-based Walters Power International's $20 million fraud conviction in Pakistan and to "take action against" it and other U.S. firms under the FCPA based on the Pakistani Supreme Court's findings of guilt.[20] Walters was eventually cleared of misconduct by the DOJ.[21]

When faced with such serial, linear enforcement proceedings, companies can be expected to resolve their successive enforcement actions in a manner similar to their original resolution.

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[18] For another list identifying companies that have entered into foreign resolutions for bribe-related conduct also resolved by way of US-based FCPA enforcement actions, see Richard L. Cassin, *Who Paid FCPA-Related Fines Overseas?*, The FCPA Blog (Aug. 8, 2011), online at http://www.fcpablog.com/blog/2011/8/8/who-paid-fcpa-related-fines-overseas.html.

[19] *See* Stolen Asset Recovery Initiative, *Asset Recovery Watch*, online at http://star.worldbank.org/corruption-cases/assetrecovery.

[20] *See* Usman Manzoor, *U.S. Urged to Take Action Against RPP Firm for $20m Fraud*, THE NEWS INTERNATIONAL (Apr.10, 2012) ("Transparency International Pakistan requests Chief, Fraud Section U.S. Department of Justice Criminal Division to kindly examine this case and take action against the U.S. firms under the anti-bribery provisions of the FCPA Act 1977.").

[21] FCPA Professor Blog, *Friday Roundup* (Dec. 7, 2013), online at http://fcpaprofessor.com/category/walters-power-international.

Indeed, the United States Department of Justice has recently addressed the challenges presented by carbon copy prosecutions. In a speech to The Clearing House's 2017 Annual Conference on November 8. Deputy Attorney General Rod Rosenstein referred to a "piling on problem," wherein "multiple law enforcement and regulatory agencies pursu[e] a single entity for the same or substantially similar conduct."[22] He cautioned that punishing the same conduct more than once "has the potential to undermine the spirit of fair play and the rule of law" and "deprive a company, as well as its employees, customers, and investors, of the benefits of certainty and finality ordinarily available through a full and final settlement."[23] Rosenstein promised that, in response to this problem, the DOJ is "committed to making a concerted effort to apportion penalties among both international and domestic agencies, where appropriate," citing as an example to a December 2016 FCPA plea agreement with a Brazilian petrochemical company where the DOJ credited the defendants for the amounts they paid to foreign law enforcement agencies.[24] Rosenstein also pointed to the DOJ's increasing coordination with antitrust and tax regulators in foreign countries and reported that the DOJ was "considering proposals to improve coordination in [multi-jurisdictional] situations and to help avoid duplicative and unwarranted payments."[25]

At the same time, Rosenstein was clear that his comments did not mean that the DOJ would never pursue fines or penalties that could be construed as overlapping. He stressed that "[t]here may be situations where the penalties in a foreign country are not an adequate substitute for those imposed by U.S. authorities, or where the punishment by another enforcement authority does not make all victims whole, including the U.S. Government and taxpayers."[26] He also emphasized the need for the DOJ to dis-incentivize companies from forum shopping internationally by making their disclosures only to more lenient foreign regulators, stating that the DOJ will "use all lawful tools to ensure that wrongdoers do not escape justice."[27] In other words, carbon copy prosecutions are here to stay.

2. Carbon Copy Prosecutions: Their Practical Implications.

When a company enters into a negotiated resolution with the DOJ, it must allocute; that is, it must *admit, accept, and acknowledge* responsibility for the underlying conduct that gave rise to liability. In the case of a guilty plea, a court is not permitted to accept a guilty plea unless it "determine[s] that there is a factual basis for the plea."[28] Moreover, a district court's acceptance of a guilty plea is a "factual finding" that a defendant is guilty of the charge.[29]

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[22] DOJ, *Deputy Attorney General Rosenstein Delivers Remarks at the Clearing House's 2017 Annual Conference* (Nov. 8, 2017) at 5, online at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-clearing-house-s-2017-annual.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] FED. R. CRIM. PROC. 11(b)(3).
[29] *See, e.g., United States v. Boutte*, 569 Fed. App'x 311, 312 (5th Cir. 2014) ("[The acceptance of a guilty plea is a factual finding reviewed for clear error."). *See also Gray v. Commissioner of Internal Revenue*, 708 F.2d 243, 246 (6th Cir. 1983) (stating that a "guilty plea is as much a conviction as a conviction following jury trial" and explaining further in the tax context that "[n]umerous federal courts have held that a conviction for federal income tax evasion, either upon a plea of guilty, or upon a jury verdict of guilt, conclusively establishes fraud in a subsequent civil tax fraud proceeding through application of the doctrine of collateral estoppel").

In contrast, and until January 2012, the SEC had a long-standing policy of settling cases by allowing a party neither to admit nor to deny the agency's allegations in the civil injunctive complaint or administrative order.[30] But on January 7, 2012, the SEC announced a modification to the "settlement language [appropriate] for cases involving criminal convictions where a defendant [ ] admit[s] violations of the criminal law."[31] "[T]he new policy does not require admissions or adjudications of fact beyond those already made in criminal cases, but eliminates language that may be construed as inconsistent with admissions or findings that have already been made in the criminal cases."[32] The policy applies regardless of whether the criminal resolution comes in the form of a conviction, deferred prosecution agreement, or non-prosecution agreement.[33] Naturally, then, the Statement of Facts in a criminal plea agreement—especially in those cases with parallel SEC enforcement exposure—can prove to be the most negotiated (and contested) portion of such a resolution.

Similarly, when a company admits to the factual basis in a DOJ-based deferred prosecution or non-prosecution agreement, the terms of the agreement typically *bar* the company from making any public statement *contradicting* the factual basis.[34] Moreover, these

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[30] *See* SEC Release No 33-5337 (Nov 28, 1972), 37 Fed Reg 25224-01 (Nov 29, 1972) (formally permitting respondent to avoid admitting or denying the allegations). See also 17 CFR § 202.5; *SEC v. Citigroup Global Markets, Inc*, 2011 WL 5903733, *4 (S.D.N.Y. 2011) (describing as "long-standing" the SEC's policy "of allowing defendants to enter into Consent Judgments without admitting or denying the underlying allegations"); *SEC v. Vitesse Semiconductor Corp*, 771 F. Supp. 2d 304, 308–10 (S.D.N.Y. 2010) (examining the history of the SEC policy). In recent years, this policy has led to increasing criticism and scrutiny by the federal courts. Compare *Citigroup Global Markets, Inc*, 2011 WL 5903733 at *2 ("[T]he Court concludes that it cannot approve [the Consent Judgment], because the Court has not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment."), with *SEC v. Citigroup Global Markets, Inc*, 673 F.3d 158, 169 (2d Cir. 2012) (granting a stay of the district court's proceedings on the ground that the SEC and Citigroup had made a "strong showing of likelihood of success in setting aside the district court's rejection of their settlement"). *See also* Letter to Counsel, *SEC v. Koss Corp.*, No 11-C-991, *1–2 (E.D. Wis. Dec. 20, 2011) (relying on the district court's decision in *SEC v. Citigroup Global Markets, Inc.*, to reject an SEC settlement with Koss Corporation and requesting "a written factual predicate" for the settlement); Adam S. Hakki, Christopher R. Fenton, and Brian G. Burke, *The Impact of the Financial Crisis on the Regulatory Landscape and the Resulting Implications for Securities Class Action Litigation*, 1950 PLI/Corp 81, 94 (Apr. 26, 2012); *SEC v. Bank of America Corp,* 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009) (denying an SEC-proposed $33 million settlement with Bank of America because, in part, Bank of America neither admitted nor denied the allegations in the Consent Judgment and took the position in its court submission that "the proxy statement in issue was totally in accordance with the law").

[31] Robert Khuzami, *Public Statement by SEC Staff: Recent Policy Change* (SEC Jan. 7, 2012), online at http://www.sec.gov/news/speech/2012/spch010712rsk.htm; Edward Wyatt, *S.E.C. Changes Policy on Firms' Admissions of Guilty*, NY TIMES, Jan. 7, 2012, at B1.

[32] Khuzami, *Public Statement* (cited in note 31). As the SEC noted, the new policy change "does not affect [the SEC's] traditional 'neither admit nor deny' approach in settlements that do not involve criminal convictions or admissions of criminal law violations." *Id.*

[33] *Id.* The SEC has recently expanded its settlement vehicles to include deferred prosecution and non-prosecution agreements. See *Enforcement Manual* §§ 6.2.3–6.2.4 at 129–33 (SEC Mar. 9, 2012), online at http://www.sec.gov/divisions/enforce/enforcement manual.pdf . *See also* SEC, Press Release, *Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement* (May 17, 2011), online at http://www.sec.gov/news/press/2011/2011-112.htm .

[34] *See* F. Joseph Warin, et al, *2009 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements* (Gibson Dunn 2010), online at http://www.gibsondunn.com/publications/pages/2009YearEndUpdateCorpDeferredProsecutionAgreements.aspx (observing that "the terms and conditions of DPAs and NPAs have become more homogenous over the past few years" and that "the vast majority of DPAs and NPAs contained provisions … prohibiting the company for making any statement that contradicts the facts as laid out in the agreement"). *See also* Khuzami, *Public Statement* (cited in note 31) ("Under the new approach … we will … [r]etain the current prohibition on denying the allegations of the Complaint/[Order Instituting Proceedings] or making statements suggesting the Commission's allegations are without factual basis.").

agreements ordinarily empower the DOJ alone to determine whether a company has breached its agreement and taken a position contradicting the factual basis.[35]

The net effect of these DOJ and SEC policies is that when a company enters into a negotiated resolution with the DOJ—particularly in those cases with parallel SEC enforcement actions—it is in real terms powerless to defend against, much less deny, the factual basis on which the resolution is based.[36] This all but ensures that a company that settles with the DOJ—or both the DOJ and SEC in parallel proceedings—will have little or no choice but to settle with foreign authorities, should such authorities choose to exercise jurisdiction and enforce their corollary anticorruption laws.

Historically—and even more so today—the principal reason that companies meticulously negotiate the factual statements included in out-of-court settlements is to blunt the onslaught of potential follow-on derivative and employment lawsuits, tort and contract law claims, securities fraud actions, and private actions under the Racketeer Influenced and Corrupt Organizations Act ("RICO").[37] By keeping the factual statement as simple as possible, companies position themselves to be able to defend themselves more vigorously against these piggyback civil actions, while at the same time avoiding claims that they are contradicting the negotiated factual statements. In today's international anticorruption climate, however, such concerns transcend civil liability and reach the very real possibility of sequential liability to foreign sovereigns.[38]

B. Noteworthy Examples of Carbon Copy Prosecutions

1. *Alcatel-Lucent.*

Take, for example, Alcatel-Lucent SA ("Alcatel-Lucent")—a case involving a *double dose* of carbon copy prosecutions. In January 2010, the French-based telecommunications equipment

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[35] *See* Warin et al., *2009 Year-End Update* (cited in note 34) (observing that pretrial diversion agreements routinely "giv[e] DOJ sole discretion to determine whether the agreement has been breached by the company").

[36] *See* F. Joseph Warin and Andrew S. Boutros, *Response, Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. In Brief 121, 128-29 (2007) (describing FirstEnergy's predicament of potentially violating its DPA because of a "highly nuanced, legalistic argument" it made in submitting a claim for insurance coverage).

[37] *See id.* at 129. The authors explain:

> As should be obvious, the whole point of a DPA is that companies may not be able to weather the storm of an indictment without it; upon indictment, companies are likely to face fundamental instability, downgrading of creditworthiness, loss of market share, diminution of stock value, market and reputational damage, debarment from certain industries, regulatory proceedings, and class actions.

Id.

[38] For a discussion of the interplay and potential implications of the United Nations Convention Against Corruption (UNCAC) on successive multi-sovereign enforcement actions, see Mary Shaddock-Jones and Thomas Fox, *The United Nations Convention Against Corruption: A New Focus?*, FCPA Compliance and Ethics Blog (Sept 8, 2011), online at http://fcpacompliancereport.com/2011/09/the-united-nations-convention-against-corruption-a-new-focus-part-i/ . Shaddock-Jones and Fox explain:

> An enforcement action based upon Article 53 could allow a country such as Nigeria to come into a U.S. court and seek compensation from a U.S. company which has committed bribery in Nigeria or require the DOJ/SEC to recognize a foreign country which has ratified the UNCAC as the "legitimate owner" of profits disgorged or fines and penalties paid to the U.S. government as a result of a FCPA violation.

Id.

and services provider agreed to pay $10 million to the Costa Rican government to settle charges that it had paid some $7 million in kickbacks to Costa Rican government officials (including $800,000 that went directly to former Costa Rican President Miguel Angel Rodriguez) to win a 2001 cellular telephone equipment contract valued at $149 million.[39] The settlement "marked the first time in Costa Rica's history that a foreign corporation agreed to pay the government damages for corruption."[40]

Less than a year later, in December 2010, U.S. authorities announced that Alcatel-Lucent and three of its subsidiaries had resolved a pending six-year FCPA investigation.[41] As part of this resolution, Alcatel-Lucent agreed to pay a combined $137.4 million to the DOJ and SEC to resolve a variety of FCPA violations arising from millions of dollars of improper payments to foreign officials in Costa Rica, Honduras, Malaysia, and Taiwan.[42] Specifically, to settle the SEC's civil complaint, Alcatel-Lucent agreed to pay $45.4 million in disgorgement to the SEC and also consented to an injunction from future violations of the FCPA's antibribery, books-and-records, and internal controls provisions.[43]

To resolve its criminal case with the DOJ, Alcatel-Lucent agreed to proceed by way of criminal information (as opposed to indictment) and entered into a three-year deferred prosecution agreement that included a nearly forty-five page statement of facts chronicling years of improper payments and lax controls.[44] Significantly, as part of its deferred prosecution agreement, Alcatel-Lucent also agreed to cooperate with foreign authorities in their investigations.[45] Specifically, Alcatel-Lucent's deferred prosecution agreement stated:

> At the request of the Department, and consistent with applicable law and regulations … Alcatel-Lucent shall also cooperate fully with such other domestic or foreign law enforcement authorities and agencies, as well as the Multilateral Development Banks ("MDBs"), in any investigation of Alcatel-Lucent, or any of its present and former officers, directors, employees, agents, consultants, contractors, subcontractors, and subsidiaries, or any other party, in any and all matters relating to corrupt payments, related

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[39] Leslie Josephs, *Update 1-Alcatel-Lucent to Pay $10 mln in Costa Rica Case* (Reuters 2010), online at http://www.reuters.com/article/2010/01/21/alcatellucent-costarica-idUSN2121041320100121. *See also* Sokenu, 43 BNA Sec Reg & L Rep 12 (cited in note 15).

[40] DOJ, Press Release, *Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation* (Dec. 27, 2010), online at http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html.

[41] *See* Government's Memorandum in Support of the Proposed Plea Agreement and Deferred Prosecution Agreement, *United States v. Alcatel-Lucent, SA*, Nos. 10-CR-20906-Cooke, 10-CR-20907-Cooke, *10, *16–17 (S.D. Fla. filed May 23, 2011) (available on Westlaw at 2011 WL 2038436). Those subsidiaries were Alcatel-Lucent Trade International, AG; Alcatel-Lucent France, SA; and Alcatel Centroamerica, SA. *See id.*

[42] DOJ, Press Release, *Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay* (cited in note 43). See also *SEC v. Alcatel-Lucent, SA*, Litigation Release No. 21795 (SEC Dec. 27, 2010), online at http://www.sec.gov/litigation/litreleases/2010/lr21795.htm.

[43] SEC, Press Release, *Company to Pay More Than $137 Million to Settle SEC and DOJ Charges* (Dec. 27, 2010), online at http://www.sec.gov/news/press/2010/2010-258.htm. *See also SEC v. Alcatel-Lucent, SA*, Litigation Release No. 21795 (cited in note 40).

[44] Deferred Prosecution Agreement, *United States v. Alcatel-Lucent, SA*, No. 10-CR-20907-Moore (S.D. Fla. filed Dec. 27, 2010) ("Alcatel-Lucent DPA"). *See also* DOJ, Press Release, *Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay* (cited in note 40).

[45] *Alcatel-Lucent DPA* at *4 (cited in note 44).

> false books and records, and inadequate internal controls, and in such manner as the parties may agree.[46]

Alcatel-Lucent also agreed that:

> With respect to any information, testimony, documents, records or other tangible evidence provided to the Department pursuant to this Agreement, Alcatel-Lucent consents to any and all disclosures, subject to applicable law and regulations … to other governmental authorities, including United States authorities and those of a foreign government, and the MDBs, of such materials as the Department, in its sole discretion, shall deem appropriate.[47]

Three of Alcatel-Lucent's subsidiaries resolved their criminal cases by pleading guilty to charges of conspiring to violate the FCPA, and each agreed to a forty-three page consolidated statement of facts.[48] As part of their plea agreements, the Alcatel-Lucent subsidiaries agreed that, "at the request of the Department," the subsidiaries would "cooperate fully with foreign law enforcement authorities and agencies."[49]

Two days later, Honduran authorities responded to the news of Alcatel-Lucent's U.S. resolution by announcing that they would *reopen* their investigation against Alcatel-Lucent and, more specifically, into the now-admitted conduct that occurred in Honduras and gave rise to Alcatel-Lucent's U.S. liability.[50] According to news reports, "Honduran anti-corruption prosecutor Henry Salgado said Honduras will ask the U.S. Securities and Exchange Commission to supply the information on which the settlement was based, [in order] to identify those [in Honduras who were] involved."[51] According to Mr. Salgado, "[i]n this case, international assistance should be asked for, in order to access the file and see who made the payments to [the Honduran government officials]. . . . If we accept the guilt, there must be people's names. We expect international collaboration."[52] Such collaboration, according to the news reports, meant that the "plan" would be to "petition" the SEC and DOJ for information.[53] This news came despite the fact that the "Alcatel relationship had already been investigated [ ] by the Honduran High Court of Auditors, who found no improprieties."[54]

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[46] *Id.*
[47] *Id.* at *5.
[48] *See* Plea Agreement, *United States v. Alcatel Centroamerica, SA*, No. 10-CR-20906-Martinez (S.D. Fla. filed Dec. 27, 2010).
[49] *Id.* at *3.
[50] Associated Press, *Honduras Reopens Alcatel Bribe Case on SEC ruling*, MERCURY NEWS (Dec. 29, 2010), online at https://www.mercurynews.com/2010/12/29/honduras-reopens-alcatel-bribe-case. Malaysian authorities are also said to be investigating Alcatel-Lucent for bribes it paid to its government officials. *See* Sokenu, 43 BNA Sec. Reg. & L. Rep. 12 (cited in note 15) ("Following the company's $137 million settlement with the Justice Department and the Commission, officials in Malaysia and Honduras, two countries mentioned in the U.S. settlement, announced that they were investigating Alcatel-Lucent's conduct in their respective countries."). Even without a carbon copy prosecution out of Malaysia, Alcatel-Lucent is believed to have served a one-year ban on participating in Malaysian government-related vendor bids, including tender offers, contracts, and joint ventures. *See* Melissa Chua, *Alcatel-Lucent Barred in Malaysian Bid Due to Bribery Allegations* (Telecom Asia Mar. 25, 2011), online at https://www.telecomasia.net/content/alca-lu-barred-axiata-tm-bids .
[51] Associated Press, *Honduras Reopens Alcatel Bribe Case* (cited in note 50).
[52] *Honduran Court of Auditors Investigated Alcatel-Lucent*, HONDURAS NEWS, Dec. 29, 2010, online at http://www.hondurasnews.com/auditors-investigate-alcatele/.
[53] *Id.*
[54] *Id.* Indeed, the manager of the Honduran State telephone company, Hondutel, was quoted as saying that "[t]he information we have from the Hondutel legal counsel is that they did research Alcatel, but it ended with nothing,

2. Nigerian-based carbon copy prosecutions.

a) The Bonny Island prosecutions: Halliburton. Although carbon copy prosecutions appear to be a globally emerging trend, the movement has been especially pronounced in Nigeria.[55] Take, for example, the case of the earlier mentioned Bonny Island joint venture, in which the TSKJ consortium[56] paid some $182 million in third party consulting fees, with the expectation that some of those fees would be used to pay bribes to Nigerian officials.[57] Three of the joint venture participants are of particular relevance here: KBR and its parent companies Halliburton and KBR, Inc;[58] Snamprogetti and its parent company ENI SpA; and JGC.[59]

When, in February 2009, Halliburton's former subsidiary KBR pleaded guilty to five counts of violating the FCPA, it admitted to being part of the TSKJ consortium that had paid at least $182 million in consulting fees.[60] As discussed above, these fees were used in part to pay bribes to Nigerian government officials between 1995 and 2004, with the goal of securing engineering, procurement, and construction contracts to build liquefied natural gas facilities. The contracts were valued at approximately $6 billion and led to KBR profits of approximately $235.5 million. As part of its plea agreement, KBR agreed to pay a $402 million criminal fine.[61] Simultaneously, KBR's current and former parent companies—KBR, Inc and Halliburton, respectively—entered into civil settlements with the SEC based on alleged internal control failures and falsified corporate books and records.[62] The two entities agreed to disgorge jointly $177 million in profits derived from the FCPA violations.[63] In total, Halliburton, KBR, Inc, and KBR agreed to a total payment package of $579 million to resolve their FCPA matters.[64]

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they found no liability at the time." *Id.* (stating also that "[t]he Honduras TSC [the Tribunal Superior de Cuentas or Secretary General of The Court of Accounts] revealed that they had investigated the administration of former Hondutel manager, Luis Alonso 'Chitin' Valenzuela, and found no civil or criminal liability between the years 2004 and 2005").

[55] Despite this fact, "the total amount of fines levied by the [Nigerian] Economic and Financial Crimes Commission (EFCC) … equates to less that 4% of the total penalties fines [sic] imposed by the United States, Germany, and the United Kingdom." *See* Cohen, Elesinmogun, and Egwuatu, *Will Nigeria Take Another Bite?* (cited in note 16). *See also* Amalu, *Bribery: SERAP Asks EFFC to Seek Damages*, *supra* note 16 (providing a detailed breakdown of the payouts made by multinational companies to resolve their Nigerian-related FCPA liability without a corresponding payout to the Nigerian government).

[56] The TSKJ consortium consisted of four companies from four different countries: (1) Technip, SA, a French company; (2) Snamprogetti Netherland BV, a Dutch company; (3) Halliburton Company, a U.S. company; and (4) JGC Corporation, a Japanese company. DOJ, Press Release, *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty* (Apr. 6, 2011), online at http://www.justice.gov/opa/pr/2011/April/11-crm-431.html.

[57] *Id.*

[58] *See supra* note 1.

[59] On January 17, 2012, Japan's Marubeni Corporation resolved FCPA liability by agreeing to pay a $54.6 million criminal fine for its role as an agent of the TSKJ consortium. *See* DOJ, Press Release, *Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty* (Jan. 17, 2012), online at http://www.justice.gov/opa/pr/2012/January/12-crm-060.html.

[60] *See* Plea Agreement, *United States v. Kellogg, Brown & Root LLC*, Case No. 09-CR-71, *38 (S.D. Tex. filed Feb. 11, 2009).

[61] *See id.*

[62] *SEC v. Halliburton Co.*, Litigation Release No 20897 (SEC Feb. 11, 2009), online at http://www.sec.gov/litigation/litreleases/2009/lr20897.htm.

[63] *Id.*

[64] *Id.*

Less than two years later, in early December 2010—*after* Halliburton, KBR, Inc., and KBR had resolved their Bonny Island criminal and civil liability in the US—Nigeria's anticorruption agency, the Economic and Financial Crimes Commission, filed a sixteen count criminal complaint, based on the *same* Bonny Island activities, against KBR, Halliburton, and current and former executives of each.[65] The charges against KBR's then-current CEO were lodged notwithstanding KBR's claim that the CEO joined KBR *after* the conclusion of the conduct associated with the Bonny Island projects.[66]

Similarly, the Nigerian government charged Vice President Cheney even though, according to Vice President Cheney's lawyer, "[t]he Department of Justice and the Securities and Exchange Commission investigated that joint venture extensively and found no suggestion of any impropriety by Dick Cheney in his role of CEO of Halliburton."[67] Despite this, news outlets reported that, according to Nigerian authorities, an arrest warrant for Vice President Cheney (and presumably others) would be "issued and transmitted through Interpol," typically the first step in an extradition process. [68]

According to some, "[i]t [was] believed the Nigerian authorities want[ed] to probe the case further *from their perspective*," notwithstanding the U.S. investigation.[69] Others speculated that the Nigerian probe was politically motivated: "There could [have] be[en] political calculations at play in the new charges. Nigerian President Goodluck Jonathan face[d] a[n] [up]coming primary election in the nation's ruling party against former Vice President Atiku Abubakar," and "the charges c[a]me as the election loom[ed]."[70] Either way, at the time, KBR insisted that it would "continue to vigorously defend itself and its executives if necessary, in th[e] matter" and it described the actions of the Nigerian government as "wildly and wrongly asserting blame."[71]

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[65] *Dick Cheney to be Charged in Nigerian Corruption Case,* THE GUARDIAN, online at https://www.theguardian.com/world/2010/dec/02/dick-cheney-halliburton-nigeria-corruption- charges. *See also* Elisha Bala-Gbogbo, *Nigeria to Charge Dick Cheney in Pipeline Bribery Case* (Bloomberg Dec. 1, 2010), online at http://www.bloomberg.com/news/2010-12-01/nigeria-to-file-charges-against-former-u-s-vice-president-over-bribery.html. Those charged included, among others, former Vice President Cheney (Halliburton's onetime CEO), Halliburton then-CEO David Lesar, Halliburton Nigeria Limited, former KBR CEO Albert "Jack" Stanley, KBR then-CEO William P. Utt, and TSKJ Nigeria Limited. *See Nigeria Files Bribery Charges against Dick Cheney* (Dec. 9, 2010), online at http://www.domain-b.com/economy/worldeconomy/20101209_bribery_charges.html. *See also* Jon Gambrell, *Nigeria Charges Dick Cheney in Halliburton Bribery Case* (NBC News Dec. 7, 2010), online at http://www.msnbc.msn.com/id/40555171/ns/world_news-africa.

[66] *See* KBR, Press Release, *KBR Statement Regarding Latest Nigerian FCPA Charges* (Dec. 7, 2010), online at http://investors.kbr.com/investors/press-releases/Press-Release-Details/2010/kbr-statement-regarding-latest-nigerian-fcpa-charges/default.aspx ("No one on KBR's current executive team was involved in the FCPA violations.").

[67] *See* Gambrell, *Nigeria Charges Dick Cheney in Halliburton Bribery Case* (cited in note 65) (further stating that "[a]ny suggestion of misconduct on [Mr. Cheney's] part, made now, years later, is entirely baseless").

[68] Bala-Gbogbo, *Nigeria to Charge Dick Cheney in Pipeline Bribery Case* (cited in note 65). *See also* Gambrell, *Nigeria Charges Dick Cheney in Halliburton Bribery Case* (cited in note 68). Gambrell quoted a Nigerian spokesperson as stating that "[w]e are following the laws of the land. We want to follow the laws and see where it will go … [w]e're very convinced by the time the trial commences, we'd make application for appropriate court orders to be issued." *Id.*

[69] *Nigeria Files Bribery Charges against Dick Cheney* (cited in note 65) (emphasis added).

[70] Gambrell, *Nigeria Charges Dick Cheney in Halliburton Bribery Case* (cited in note 65). *See also Halliburton Settles Nigeria Bribery Claims for $35 Million* (CNN Dec. 21, 2010), online at http://www.cnn.com/2010/WORLD/africa/12/21/nigeria.halliburton/index.html ("Many observers in Nigeria regarded the charges as a publicity stunt by the financial crimes commission ahead of national elections in April and as a symbolic effort to display resolve against government corruption.").

[71] KBR, Press Release, *KBR Statement Regarding Latest Nigerian FCPA Charges* (cited in note 66).

Less than two weeks later, however, KBR's fight ended when Halliburton agreed to pay $35 million to the Nigerian authorities to settle bribery allegations of "distribution of gratification to public officials."[72] According to Halliburton's statement on the issue:

> Pursuant to [the settlement] agreement, all lawsuits and charges against KBR and Halliburton corporate entities and associated persons have been withdrawn, the [Federal Government of Nigeria (FGN)] agreed not to bring any further criminal charges or civil claims against those entities or persons, and Halliburton agreed to pay US$32.5 million to the FGN and to pay an additional US$2.5 million for FGN's attorneys' fees and other expenses.[73]

Halliburton also "agreed to provide reasonable assistance in the FGN's effort to recover amounts frozen in a Swiss bank account of a former … agent [associated with the Bonny Island projects] and affirmed a continuing commitment with regard to corporate governance."[74]

b) Snamprogetti & JGC Corporation. A similar pattern ensued with Snamprogetti and JGC Corporation, two additional members of the TSKJ consortium. In July 2010, the Italian energy company ENI SpA and its Dutch subsidiary Snamprogetti resolved FCPA charges arising out of their shares of bribes paid in connection with the Bonny Island projects.[75] ENI and Snamprogetti jointly settled their civil cases with the SEC and agreed to disgorge $125 million in profits.[76] Snamprogetti also entered into a deferred prosecution agreement with the DOJ to resolve two criminal counts of FCPA-related violations and agreed to pay a $240 million criminal fine.[77] Less than five months later, Snamprogetti agreed to pay $32.5 million to settle a carbon copy prosecution brought by Nigerian authorities for the same conduct that gave rise to its FCPA liability.[78] In return, the "Federal Government of Nigeria agreed to

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[72] Halliburton, Press Release, *Halliburton Confirms Agreement to Settle with Federal Government of Nigeria* (Dec. 21, 2010), online at https://www.businesswire.com/news/home/20101221005624/en/Halliburton-Confirms-Agreement-Settle-Federal-Government-Nigeria. *See also Halliburton Settles Nigeria Bribery Claims* (cited in note 70).

[73] Halliburton, Press Release, *Halliburton Confirms Agreement to Settle with Federal Government of Nigeria* (cited in note 72).

[74] *Id.*

[75] DOJ, Press Release, *Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty* (July 7, 2010), online at http://www.justice.gov/opa/pr/2010/July/10-crm-780.html.

[76] *SEC v. ENI, SpA, and Snamprogetti Netherlands, BV*, Litigation Release No. 21588 (SEC July 7, 2010), online at http://www.sec.gov/litigation/litreleases/2010/lr21588.htm .

[77] *Id.* Snamprogetti was charged by criminal information with (1) conspiracy to violate the FCPA and (2) aiding and abetting an FCPA violation. See Criminal Information, *United States v. Snamprogetti Netherlands BV*, No. 4:10-CV-2414 (S.D. Tex. filed July 7, 2010).

[78] ENI Saipem SpA, Press Release, *Snamprogetti Netherlands BV Enters Agreement with Federal Government of Nigeria* (Dec. 20, 2010), online at http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/ Snamprogetti_Nigeria_Settlement_Company_Statement_2013pr_10-12-20_TSKJ.pdf . Specifically, Snamprogetti announced that it had "entered into a settlement and non-prosecution agreement with the Nigerian authorities" and agreed "to the payment of a criminal penalty of $30 million and of $2.5 million as reimbursement for legal costs and expenses incurred by the Nigerian authorities." *Id. See also* Samuel Rubenfeld, *Eni Unit Reaches $32.5 Million Settlement With Nigeria*, Corruption Currents Blog (Wall Str. J. Dec. 20, 2010), online at http://blogs.wsj.com/corruption-currents/2010/12/20/eni-unit-reaches-325-million-settlement-with-nigeria/.

dismiss all charges against Snamprogetti … and to renounce to [sic] any civil claims and criminal charges in any jurisdiction" against the company.[79]

Similarly, in January 2011, JGC Corporation agreed to pay $28.5 million to Nigerian authorities to resolve its portion of the bribes paid by the TSKJ consortium.[80] But in a reversal of the typical order of enforcement proceedings, four months later, JGC Corporation entered into a deferred prosecution with the DOJ to resolve criminal FCPA charges.[81] As part of its US-based resolution, JGC Corporation agreed to pay a $218.8 million criminal fine.[82]

c) Shell and Siemens. In 2010, the Nigerian Economic and Financial Crimes Commission brought additional carbon copy prosecutions against FCPA defendants that had resolved international bribery cases with U.S. authorities.[83] First, Royal Dutch Shell Plc ("Shell") paid $10 million to Nigerian authorities in December 2010[84] after already having paid $48.15 million in criminal fines, disgorgement of profits, and interest to U.S. authorities in November 2010.[85] Second, Siemens AG paid $46.5 million to Nigerian authorities in

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[79] *See* ENI Saipem SpA, Press Release, *Snamprogetti Netherlands BV Enters Agreement with Federal Government of Nigeria* (cited in note 78).

[80] *See* JGC Corp., *Consolidated Financial Statements—Summary* (May 13, 2011), online at http://www.jgc.com/en/ViewPdf/financialSummary/426 .

[81] DOJ, Press Release, *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation* (cited in note 56) (stating that JGC Corporation was charged with one count of conspiracy to violate the FCPA and a second count of aiding and abetting an FCPA violation).

[82] *Id.*

[83] In addition to the enforcement actions brought by Nigerian authorities described above, there is believed to be at least one remaining open carbon copy Nigerian-led investigation. *See* Sokenu, 43 BNA Sec. Reg. & L. Rep. 12 (cited in note 15), citing Joe Palazzolo, *2011: The Year of the FCPA Piggyback?*, Corruption Currents Blog (Wall Str. J. Dec. 29, 2010), online at https://blogs.wsj.com/corruption-currents/2010/12/29/2011-the-year-of-the-fcpa-piggyback/ ("Panalpina itself is under investigation in Nigeria for bribery, after paying $82 million in civil and criminal penalties to settle bribery allegations in the U.S."). Panalpina, as part of its plea agreement in the U.S., has already agreed to "cooperate with the Department and with any other federal, state, local, or foreign law enforcement agency subject to and consistent with any applicable laws and regulations." *See* Plea Agreement, *United States v. Panalpina*, Case No. 10-CR-765, *5 (S.D. Tex. filed Nov. 4, 2010) (available on Westlaw at 2010 WL 4523728). It has also "consent[ed] to any and all disclosures consistent with applicable law and regulation to other governmental authorities, including United States authorities and those of a foreign government, of such materials as the Department, in its sole discretion, shall deem appropriate." *Id.*

[84] *See* Elisha Bala-Gbogbo, *Shell Pays $10 Million Fine to Nigerian Government* (Bloomberg Dec. 22, 2010), online at http://www.bloomberg.com/news/2010-12-22/shell-pays-10-million-fine-to-nigerian-government-update1-.html.

[85] *See* DOJ, Press Release, *Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties* (Nov. 4, 2010), online at http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html. Shell's deferred prosecution agreement obligated it to:

> At the request of the Department, and consistent with applicable law and regulations … cooperate fully with other domestic or foreign law enforcement authorities and agencies as well as the Multilateral Development Banks ("MDBs"), in any investigation of [Shell], or any of its present and former directors, employees, agents, consultants, contractors, subcontractors, subsidiaries, affiliates, or any other party, in any and all matters relating to corrupt payments and related false books, records, and inadequate internal controls.

See Deferred Prosecution Agreement, *United States v. Shell Nigeria Exploration and Production Co.*, No. 10-CR-767, *4–7 (S.D. Tex. filed Nov. 4, 2010). Shell's deferred prosecution agreement also contained a consent provision that provided that Shell "consent[ed] to any and all disclosures consistent with applicable law and regulation to other governmental authorities, including United States authorities and those of a foreign government, and the MDBs, of such materials as the Department, in its sole discretion, shall deem appropriate." *Id.* at *6–7. BizJet International Sales and Support, Inc.'s FCPA-predicated deferred prosecution agreement with the DOJ contains another more recent—yet virtually identical—cooperation obligation. *See* Deferred Prosecution Agreement, *United States v. BizJet International Sales and Support, Inc*, Case No. 12-CR-61, *3–5 (N.D. Okla. filed Mar 14, 2012).

November 2010[86] after having paid $800 million to U.S. authorities to resolve the largest-ever FCPA matter in U.S. history and $569 million to the Munich, Germany, Public Prosecutor's Office—for a total combined payment of nearly $1.4 billion—in December 2008.[87]

Indeed, Siemens has been the subject of a variety of other anticorruption carbon copy enforcement actions and debarment proceedings besides its resolutions with US, German, and Nigerian authorities. For example, on March 9, 2009, Siemens was notified by the Vendor Review Committee of the United Nations Secretariat Procurement Division (UNPD) that it was being suspended from the UNPD vendor database for a minimum period of six months.[88] Siemens' suspension "stemmed from [its] guilty plea in December 2008 to violations of the U.S. Foreign Corrupt Practices Act."[89] Although Siemens sought to lift the suspension on December 22, 2009, it remained disqualified from United Nations contracting opportunities until January 14, 2011, at which point Siemens was invited to re-register with the UNPD.[90]

Similarly, on July 2, 2009, "in the wake of the company's acknowledged past misconduct in its global business," Siemens entered into global settlement with the World Bank Group in which it agreed to pay $100 million over the next fifteen years to support anticorruption work.[91] Siemens also agreed to up to a four-year debarment for its Russian subsidiary and a voluntary two-year cease-and-desist from bidding on World Bank business for Siemens AG and all of its consolidated subsidiaries and affiliates.[92] In addition, in February 2012, Siemens agreed to pay the Greek government €270 million (approximately $336 million) to resolve bribes dating back to the 1990s.[93] The Greek Parliament approved the settlement on April 5, 2012.[94] Despite the fact that Siemens has resolved the above matters, it continues to "remain[] subject to corruption-related investigations in several jurisdictions around the world."[95]

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[86] *See* Alexandra A. Wrage and Sarah Geiger, *Recent Domestic Bribery Enforcement Developments in Nigeria*, TRACEblog (TRACE Dec. 23, 2010), online at https://www.traceinternational.org/blog/566/Recent_Domestic_Bribery_Enforcement_Developments_in_Nigeria.

[87] *See* DOJ, Press Release, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines* (Dec. 15, 2008), online at http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html. Specifically, Siemens agreed to pay a criminal fine of $450 million to the Department of Justice and $350 million in disgorgement of profits to the SEC. In the German prosecution, Siemens agreed to pay €395 million (approximately $569 million), in addition to the €201 million (approximately $287 million) it paid in October 2007 to settle another related enforcement action brought by the Munich Public Prosecutor. *Id.*

[88] Siemens AG, Press Release, *Q2 Legal Proceedings* (May 4, 2011), online at http://www.siemens.com/press/pool/de/events/2011/corporate/2011-q2/2011-q2-legal-proceedings-e.pdf.

[89] *Id.*

[90] *Id.*

[91] World Bank Group, Press Release, *Siemens to Pay $100m to Fight Corruption as Part of World Bank Group Settlement* (July 2, 2009), online at https://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Siemens_World_Bank_Settlement_WB_PR_Jul_2_2009.pdf .

[92] *Id.*

[93] Siemens AG, Press Release, *Siemens and the Hellenic Republic Reach a Settlement Agreement and Mark a New Beginning* (Apr. 5, 2012), online at http://www.siemens.com/press/en/pressrelease/?press=/en/pressrelease/2012/corporate/axx20120420.htm. *See also* Alexandra A. Wrage and Sarah Geiger, *Siemens' Settlement with Greece is Now Official*, TRACEblog (TRACE Apr. 10, 2012), online at https://www.traceinternational.org/blog/470/Siemens_settlement_with_Greece_is_now_official .

[94] Siemens AG, Press Release, *Siemens and the Hellenic Republic Reach a Settlement* (cited in note 90).

[95] Siemens AG, Press Release, *Q2 Legal Proceedings* (cited in note 88). For a list of the remaining country-specific investigations of Siemens, see http://www.traceinternational.org/TraceCompendium/Detail/124?class=casename_searchresult&type=1 .

3. *Other Examples*

U.S. authorities have sometimes carbon copied other jurisdictions, as well. For example, in 2013, a Ukrainian subsidiary of Archer-Daniels-Midland Company, Alfred C. Toepfer International, entered a guilty plea in the Central District of Illinois to violating the FCPA by paying bribes to Ukrainian official in exchange for tax refunds.[96] The plea agreement recognized that German authorities had previously prosecuted the same conduct and gave Toepfer $1,338,387 in credit to account for the German fine, resulting in U.S. criminal penalties of $17.8 million.[97] A parallel SEC proceeding ended in a consent judgment requiring the company to pay roughly $36.5 million in disgorgement and prejudgment interest.[98]

Similarly, in 2014, the DOJ and SEC settled with ZAO Hewlett-Packard A.O. over charges of Russian bribery.[99] The DOJ's plea agreement acknowledged a previous German investigation and payment by ZAO HP and ultimately assessed a fine of $58.8 million.[100] UK-based pharmaceutical company Glaxo-Smith-Kline was likewise prosecuted first in China and then in the United States over allegations that it bribed health officials and doctors in China to prescribe its products.[101] In September 2014, a Chinese court fined the company $490 million; it then paid a $20 million civil penalty to the SEC in 2016.[102] In November 2016, the Indian Central Bureau of Investigation filed corruption charges against Embraer SA, which had resolved similar charges with Brazil and the U.S. in October 2016.[103] And Dutch oil services company SBM Offshore NV paid a $238 million to U.S. authorities and entered into a deferred prosecution agreement in November 2107 for bribing government officials in Brazil, Angola, Equatorial Guinea, and Iraq.[104] SBM was first investigated by Dutch Authorities and paid a $240 million settlement there in 2014, and also reached a $342 million settlement with Brazilian authorities in 2016.[105]

And although they are not carbon copy prosecutions in the sense we have defined that term, a few additional recent U.S. prosecutions have reflected international cooperation and purported to resolve corruption allegations for multiple international jurisdictions. These "global" resolutions are worth noting. For example, in January 2017, Rolls Royce plc "agreed to pay the U.S. nearly $170 million as part of an $800 million global resolution to investigations by the department, U.K. and Brazilian authorities into a long-running scheme

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[96] Holtmeier, *supra* note 8, at 501.
[97] Plea Agreement, *United States v. Toepfer,* No. 13-cr-20062 (C.D. Ill. Dec. 23, 2013), online at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/03/acti-plea-agreement.pdf.
[98] SEC, Press Release, *SEC Charges Archer-Daniels-Midland Company with FCPA Violations* (Dec. 20, 2013), online at https://www.sec.gov/news/press-release/2013-271.
[99] Holtmeier, *supra* note 8, at 501.
[100] Plea Agreement, *United States v. ZAO Hewlett-Packard*, No. CR-14-201 (N.D. Cal. Apr. 9, 2014), online at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/ 2014/04/09/hp-russia-plea-agreement.pdf.
[101] Richard L. Cassin, *GSK Pays SEC $20 Million to Settle China FCPA Violations,* The FCPA Blog (Sept. 30, 2016), online at http://www.fcpablog.com/blog/2016/9/30/gsk-pays-sec-20-million-to-settle-china-fcpa-violations.html.
[102] *Id.*
[103] *CBI Contacts Switzerland and Singapore over Embraer Probe*, Global Investigations Review (June 8, 2017), online at http://globalinvestigationsreview.com/short-cut/2017/june/08#1142708.
[104] DOJ Press Release, SB*M Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries* (Nov 29, 2017), online at https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case.
[105] David Simon *et al.*, *5 Things to Watch for in FCPA Enforcement This Year,* Law 360 (Jan. 1, 2018).

to bribe government officials in exchange for government contracts."[106] The allegations against Rolls Royce included bribery of officials in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, and Iraq, and the company also agreed in separate contemporaneous settlements to pay $604,808,392 to the United Kingdom's Serious Fraud Office and $25,579,170 to Brazil's Ministerio Publico Federal.[107] Similar recent cases of international cooperation and coordination have included Odebrecht SA, VimpelCom Ltd., and Telia Company AB.[108]

III. CARBON COPY PROSECUTIONS: EVALUATING THE COST-BENEFIT CONSIDERATIONS (AND SELF-REPORTING OPTIONS)

The recent trend towards transnational carbon copy prosecutions has created some unavoidable forks in the road for those mired in internal investigations and follow-on government-led actions. At the initial stage of disclosure, for example, companies now must evaluate not only whether to voluntarily disclose potential FCPA violations to U.S. authorities,[109] but they must also consider whether, and to what extent, to make simultaneous—or nearly simultaneous—*front-end* self-disclosures to foreign authorities. Of course, real costs and benefits inform this analysis.

A. Potential Benefits of Early Multi-Sovereign Disclosures to U.S. and Foreign Authorities

1. *Front-End Considerations*

On one side of the ledger, simultaneous multi disclosures to U.S. and foreign officials ensure that the very entity that presumably benefited from the improper payments, or on whose behalf the improper payments were made, promptly and directly delivers the bad news to interested government authorities. Multi-sovereign disclosures also ensure that foreign governments are—or, at least, can be said to be—treated equally to the U.S. government. Indeed, early multi disclosures are an acknowledgement at some level that the foreign jurisdiction that is the site of the crime, and whose government officials may have actually been corrupted, has at least an equally great interest in vindicating its own local laws.[110]

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[106] DOJ, Press Release, *Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case* (Jan. 17, 2017), online at https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act.

[107] *Id.*

[108] Patrick Stokes & Zachariah Lloyd, *40 Years of FCPA: Cross-Border Efforts and Growing Risk,* Law360 (Dec. 12, 2017), online at https://www.law360.com/articles/ 985120/40-years-of-fcpa-cross-border-efforts-and-growing-risk.

[109] *See* DOJ, *Principles of Federal Prosecutions of Business Organizations* § 9-28.300, 3–5 (2008), online at http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf (instructing prosecutors to consider, among other things, "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents," and "to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies"). For a discussion of the effect of the Dodd-Frank Whistleblower Protection Act on that calculus, see Funk, *Another Landmark Year: 2010 FCPA Year-In-Review and Trends for 2011*, 3 Bloomberg L. Rep.—White Collar Crime at 5 (Jan. 3, 2011).

[110] For example, Nigerian-based SERAP asked the SEC "to establish a process enabling foreign government entities victimized by FCPA violations, on a case-by-case basis, to apply for some or all of the [FCPA] civil penalties and disgorgement proceeds companies agree to pay to settle SEC investigations." Alexander W. Sierck, *African NGO Asks for Distribution of FCPA Recoveries*, The FCPA Blog (Mar. 16, 2012), online at http://www.fcpablog.com/blog/2012/3/16/african-ngo-asks-for-distribution-of-fcpa-recoveries.html (citing Alexander W. Sierck, *Letter to Robert S. Khuzami re FCPA Civil Penalty and Disgorgement Proceeds* *1). According to SERAP, "victimized foreign government entities bear the cost of bribery and corruption of their officials." Sierck, *Letter to*

Moreover, U.S. authorities may favorably view such transnational disclosures. Such disclosures demonstrate a corporate commitment to making aggrieved sovereigns whole, or, at a minimum, reflect respect for the local jurisdictions. Prompt and direct local disclosures also avoid a scenario in which foreign governments are caught off guard with headline-grabbing news of corrupt conduct committed by their own officials. Multi-front disclosures enable local governments to get ahead of a potential media crisis[111] and are likely to place the company in better stead with the local jurisdictions. In short, early disclosures empower local authorities to gain control of a situation; to remove or otherwise contain corrupt public officials earlier rather than later in the process; and to respond proactively to allegations of government corruption.

Multi-front disclosures also tend to reduce the likelihood of duplicative investigatory work, both for law enforcement authorities and private counsel, and thus have the potential to lead to economies of scale. Early multi-sovereign disclosures ensure that potentially interested foreign and domestic governments are consulted from the beginning on matters relating to the investigation, including, for example, how the investigation can be conducted; what additional follow-up items might be pursued; and what local legal or factual concerns should be addressed during an otherwise U.S.-focused investigation. Such disclosures also make it more likely that foreign governments will be willing to cooperate and coordinate *both* with U.S. authorities *and* with company counsel in their collective efforts to interview witnesses, obtain permission to enter the local jurisdictions, and otherwise obtain and export relevant material from the local jurisdictions to the United States.[112]

2. *Back-End Considerations*

At the back-end, early multi-sovereign disclosures are also more likely to lead to global settlements, with the benefits of coordinated resolutions and across-the-board finality.[113] For

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Robert S. Khuzami at *2. As such, in its request, SERAP proposed a variant of the carbon copy prosecution concept: "[A]fter, and only after, public notice of an FCPA settlement agreement, the victim foreign government entity … [should be allowed] to file a request that the Enforcement Division pay some or all of the agreed payment proceeds to or for the benefit of the victim government entity or to a home country-based or US-based NGO." *Id.* at *4. In SERAP's own words, its "proposal would only come into play after an FCPA matter has been resolved, typically as a result of a settlement with the company." *Id.* In May 2012, the SEC responded to SERAP's proposal by pointing out that "the framework of [U.S.] securities laws requires a proximate connection to the harm caused by a particular violation." Benjamin Kessler, *Giving Back to the Victims*, The FCPA Blog (May 2, 2012), online at http://www.fcpablog.com/blog/2012/5/2/giving-back-to-the-victims.html, citing Robert S. Khuzami, *Letter to Alexander Sierck* *1 (Apr. 25, 2012).

111 *See* F. Joseph Warin and Andrew S. Boutros, *FCPA Investigations: Working Through a Media Crisis*, 22 BNA White-Collar Crime Rep. 3 (Nov. 29, 2007).

112 One example o a law that makes removal of material from a jurisdiction difficult is China's law on the protection of State secrets. See Congressional-Executive Commission on China (CECC), *Law of the People's Republic of China on Guarding State Secrets*, (Dec. 13, 2003), online at https://www.cecc.gov/resources/legal-provisions/1989-law-on-guarding-state-secrets-chinese-and-english-text. *See also* CECC, *National People's Congress Standing Committee Issues Revises State Secrets Law* (May 20, 2010), online at http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=140456. The law covers "matters that have a vital bearing on state security and national interests," see CCEC, *Law of the People's Republic of China on Guarding State Secrets* (cited in this note), which could extend to information collected as part of an internal investigation. *See You Can't Always Get What You Want: China's State Secrets Laws*, ANTI-CORRUPTION Q. 1, 4 (Sidley Austin LLP 3d Quarter 2011), online at http://www.sidley.com/files/upload/Anti-Corruption.pdf ("Foreign companies, therefore, should take a very cautious approach to conducting internal investigations in China, even where the documents at issue would not commonly be considered to implicate a state secret.").

113 *See* Sokenu, 43 BNA Sec. Reg. & L. Rep. 12 (cited in note 15) ("While such settlements offer closure, they can be incredibly tricky to negotiate and even trickier to get approved through courts that are not familiar with U.S.-style

example, coordinated worldwide disclosures and ensuing investigations generally increase the likelihood that a corporation can successfully petition U.S. authorities for one-for-one credit for any compensatory or penal payment made to local authorities as part of a global resolution.[114] The converse is also true; by cooperating and complying with local authorities from the beginning of an investigation, a company might be more successful in its effort to dissuade a foreign government, even the United States, from bringing a carbon copy prosecution.[115] Even beyond questions of prosecutorial discretion, however, the substantive laws of other nations and other related treaty obligations may well create serious advantages that favor—or disadvantages that cut against—early front-end multi-sovereign disclosures.

3. *International Double Jeopardy a Key Consideration*

As a matter of U.S. law, "[t]he Constitution of the United States has not adopted the doctrine of international double jeopardy."[116] That is, "prosecution by a foreign sovereign does not preclude the United States from bringing criminal charges,"[117] nor does the Double Jeopardy Clause "prevent extradition from the United States for the purpose of a foreign prosecution following prosecution in the United States for the same offense."[118] But the same rule does not hold true in other nations—"[t]here are [] limitations on multiple prosecutions by different sovereign jurisdictions established by treaty or [foreign] domestic laws."[119]

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settlement.").

[114] *See* Warin *et al*., *2008 Year-End FCPA Update* (cited in note 10) (summarizing comments made by the Department of Justice's then FCPA Chief Mark Mendelsohn and citing "the 2006 Statoil and 2007 Akzo Nobel prosecutions as examples in which DOJ has credited penalties paid in foreign jurisdiction against those to be paid in the United States.").

[115] *See id.* (quoting former FCPA Chief Mendelsohn as stating, "[t]here are other cases that are not public where we have elected to do nothing in deference to ongoing foreign investigations—or to sit back and wait to see what the outcome of that foreign investigation will be"). *See also id.* ("If that foreign investigation results in some enforcement action, we may elect to do nothing. On the other hand, if . . . that foreign prosecution never gets off the ground, we may step in and proceed with our investigation.").

[116] *United States v. Martin*, 574 F.2d 1359, 1360 (5th Cir. 1978). See also *United States v. Jeong,* 624 F.3d 706, 712 (5th Cir. 2010) ("Double jeopardy thus does not attach when separate sovereigns prosecute the same offense, as here."); *Chua Han Mow v. United States*, 730 F.2d 1308 (9th Cir. 1984) (describing a contrary argument as "frivolous").

[117] *United States v. Richardson*, 580 F.2d 946, 947 (9th Cir. 1978). As the Supreme Court stated in the context of successive state-state prosecutions, "[w]hen a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offences," and as such, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Heath v. Alabama*, 474 U.S. 82, 93 (1985).

[118] *Elcock v. United States*, 80 F. Supp. 2d 70, 75 (E.D.N.Y. 2000). *See also United States v. Guevara,* 443 Fed. App'x 641, 644 (2d Cir. 2011); *In re Ryan*, 360 F. Supp. 270, 274 (E.D.N.Y. 1973), affd 478 F.2d 1397 (2d Cir. 1973) ("There is no constitutional right to be free from double jeopardy resulting from extradition to the demanding country.").

[119] *See* Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role Of Ne Bis In Idem*, 8 SANTA CLARA J. INT'L L. 165, 172–73 (2010). *See also, e.g., Treacy v. Director of Public Prosecutions* [1971] A.C. 537 (HL) (Diplock, L.J.); Lissa Griffin, *Two Sides of a "Sargasso Sea": Successive Prosecution for the "Same Offence" in the United States and the United Kingdom*, 37 U. RICHMOND L. REV. 471, 490 (2002). Griffin explains:

> Protection against successive prosecution under United Kingdom law is afforded in two different ways: first, there is a core "same-elements" protection that is based on the pleas of autrefois acquit and autrefois convict; second, this narrow protection is supplemented by a broad judicial discretion to stay successive prosecutions under the doctrine of "abuse of process."

Id.

For example, Richard Alderman, while then the Director of the United Kingdom's Serious Fraud Office (SFO), discussed key differences between the U.S. and the U.K. approaches to the double jeopardy doctrine, as well as the doctrine's effects on the U.K.'s ability to bring a carbon copy prosecution.[120] Using the BAE enforcement action to expound upon the operation and application of the UK double jeopardy doctrine, Director Alderman candidly explained that when BAE "agreed to plead guilty to offences brought by the U.S. Department of Justice[,] [t]hat plea of guilty had consequences so far as the SFO's investigation was concerned."[121] According to Director Alderman, because BAE "pleaded guilty in the U.S. to offences relating to Central and Eastern Europe[,] [u]nder the U.K. law of double jeopardy, it was no longer possible for the SFO investigation relating to Central and Eastern Europe to continue."[122] Given that "the law on double jeopardy differs as between the U.S. and the U.K.," Director Alderman stated rather explicitly that "the SFO needed to terminate the investigations relating to Central and Eastern Europe once [BAE's] plea of guilty was entered in the US."[123]

Director Alderman next explained that the U.K. double jeopardy analysis depends not on the offense charged by the original charging jurisdiction, but rather on the underlying facts used to support the offense, regardless of the offense itself.[124] Specifically, Director Alderman responded as follows when presented with a question regarding the SFO's prosecution of BAE after BAE entered into its resolution with U.S. authorities:

> [Question]: As to the double jeopardy issue, the offense BAE pleaded guilty to in the U.S. was not a corruption offense, but rather a charge of conspiracy to make false statements to the U.S. government including as to its compliance with the provisions of the FCPA. . . . [C]ertain of the factual allegations supporting this non-corruption offense related to Central and Eastern Europe. Are you suggesting that simply because facts are alleged in a U.S. prosecution to support a non-corruption charge, that the U.K. is thereby prohibited from bringing a corruption charge as to those facts?
>
> [Director Alderman's Answer]: Yes. [The UK] double jeopardy law looks at the facts in issue in the other jurisdiction and not the precise offence. Our law does not allow someone to be prosecuted here in relation to a set of facts if that person has been in jeopardy of a conviction in relation to those facts in another jurisdiction. As a result I could not continue to consider whether to prosecute BAE for an offence relating to Central and Eastern Europe once BAE had pleaded guilty in the US.[125]

Thus, in deciding whether to make front-end or back-end multi-sovereign disclosures, careful consideration should be given to the double jeopardy doctrine and practices of the local

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[120] Richard Alderman stepped down as the SFO Director on April 20, 2012. *See* Lindsay Fortado, *U.K. Serious Fraud Chief Walks Away From Agency in Flux* (Bloomberg Apr. 20, 2012), online at http://www.bloomberg.com/news/2012-04-20/u-k-serious-fraud-office-chief-walks-away-from-agency-in-flux.html.
[121] Mike Koehler, *A Conversation with Richard Alderman Regarding BAE*, FCPA Professor Blog (Mar. 15, 2011), online at http://www.fcpaprofessor.com/a-conversation-with-richard-alderman-regarding-bae (linking to a transcript of the interview).
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] Koehler, *A Conversation with Richard Alderman Regarding BAE* (cited in note 121).

jurisdiction (and of any other interested nation with extraterritorial anticorruption jurisdictional reach).

B. Potential Costs of Early Multi-Sovereign Disclosures to U.S. and Foreign Authorities

Early multi-sovereign disclosures—and the cascading consequences that flow from them—are also not without distinct potential drawbacks. To state the obvious, such disclosures have the prospect of exponentially complicating investigations. They could necessitate that resources be allocated across different continents, with teams of professionals simultaneously interacting with different government personalities, constituents, cultures, and priorities. They could require organizations to staff and coordinate worldwide investigations moving at different paces, with different scopes and focuses, and responding to varying levels of governmental sophistication.

Parallel cross-border investigations can also implicate conflicting substantive laws, procedural rules, modes of evidence gathering, and data privacy rights. They can expose *persons*—not just companies—to sequential prosecutions by multiple sovereigns, absent a treaty or local law to the contrary.[126] They could lead foreign sovereigns to charge—and seek the extradition of—US executives or non-US personnel before the completion of the U.S. investigation. They have the potential to cause local persons implicated in the underlying conduct—or even material witnesses with relevant information—not to cooperate with a joint US-local sovereign investigation. And, in the view of some, early disclosures to—and coordinated efforts on the part of—foreign governments may all but ensure that foreign sovereigns bring their own tagalong enforcement actions, as proof positive of their commitment to fight corruption and to secure concrete, tangible results for their early involvement in, and assistance with, the U.S. investigation. In fact, in investigations of potentially improper payments in multiple jurisdictions, one foreign government might choose to break away from the pack and strike first, insisting on settling its matters first, even in those cases where the global investigation is, as a whole, far from complete.[127]

Quarterbacking these myriad issues—much less doing so in a seamless and efficient manner—poses serious challenges at a variety of levels. As one practitioner summarized, "[i]nterest from law enforcement agencies from other countries significantly increases the complexities surrounding when, and to whom, to self-report, how and when to conduct internal investigations, what to do with the results of the internal investigation, and how to structure global settlements with multiple countries with conflicting legal jurisprudence."[128]

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[126] *See United States v. Jeong*, 624 F.3d 706, 711-12 (5th Cir. 2010) (upholding a defendant's sequential U.S.-based conviction following his South Korean conviction for the same conduct and holding that Article 4.3 of the OECD's Anti-Bribery Convention "does not prohibit two signatory countries [such as the United States and South Korea] from prosecuting the same offense" because the OECD Convention only requires countries with concurrent jurisdiction to consult with one another upon request).

[127] Alcatel-Lucent's resolution with Costa Rican authorities, which occurred nearly a year before Alcatel-Lucent settled its FCPA case with U.S. authorities, might be one such example. See note 39.

[128] Sokenu, 43 BNA Sec. Reg. & L. Rep. 12 (cited in note 15).

NOT TO BE OVERLOOKED: THE POTENTIAL COLLATERAL ESTOPPEL EFFECTS OF FOREIGN JUDGMENTS

As an historical matter, the critical issue of the potential collateral estoppel effects of carbon copy prosecutions often receives inadequate attention. By way of illustration, assume a company's employee brings a whistleblower retaliation action in India. The case is fully and fairly litigated between the company and the employee, and the employee prevails. There is a very real chance that—barring something improper about the India-based litigation—if the employee also brings a whistleblower action in a U.S. court, key factual disputes may be deemed to have been resolved in the foreign litigation.

A. The Nuts and Bolts of Collateral Estoppel

Collateral estoppel, also known as "issue preclusion," is a common law estoppel doctrine that prevents a party from relitigating an issue. Put another way, once a court has decided an issue of fact or law necessary to its judgment, collateral estoppel precludes relitigation of the same *issue* in a different suit involving the parties to the first case.[129] In contrast, res judicata, also known as "claim preclusion," bars litigation of the same *case* between the same parties.[130]

Collateral estoppel can also apply to criminal cases.[131] Unlike double jeopardy, which generally requires a prior acquittal or conviction to preclude the proceedings, collateral estoppel is not similarly limited. To the contrary, "collateral estoppel is applicable in criminal cases only when double jeopardy is not."[132] And in respect of issues resolved in foreign proceedings, provided the foreign proceedings were fair, impartial, and compatible with U.S. conceptions of due process of law, facts resolved in foreign courts can have a preclusive effect on subsequent proceedings in U.S. courts.[133] What follows is a brief discussion of the steps

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[129] See *Vargas-Colon v. Fundacion Damas, Inc.,* 864 F.3d 14, 25 (1st Cir. 2017) (holding that collateral estoppel barred plaintiff from re-litigating issue of vicarious liability already decided in bankruptcy proceeding); *Muegler v. Bening*, 413 F.3d 980 (9th Cir. 2005) (holding that collateral estoppel can be used to prevent a debtor from re-litigating the issue of fraud in a nondischargeability action in bankruptcy court).

[130] *See Allen v. McCurry*, 449 U.S. 90, 94 (1980). As the Court explained:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Id.; *see also Depianti v. Jan-Pro Franchising Int'l, Inc.,* 873 F.3d 21, 28 (1st Cir. 2017).

[131] *See, e.g., Ashe v. Swenson*, 397 U.S. 436, 443-46 (1970) (holding that the state, which prosecuted the defendant for multiple robberies, was collaterally estopped from relitigating the issue of identity). *See also United States v. Ceron,* 775 F.3d 222, 225 (5th Cir. 2014) ("Collateral estoppel applies in criminal cases, but it is not raised often and we have observed that the efficiency concerns that drive the collateral estoppel policy on the civil side are not nearly so important in criminal cases."); *United States v. Bailin*, 977 F.2d 270, 275–76 (7th Cir. 1992) (applying the principle of collateral estoppel to a criminal case).

[132] *Bailin*, 977 F.2d at 275. *See also United States v. Stauffer Chemical Company*, 464 U.S. 165 (1984) (applying collateral estoppel to bar contempt proceeding where parties had litigated identical issues in prior proceeding to quash a warrant); *United States v. Shenberg*, 89 F.3d 1461, 1479 (11th Cir. 1996) ("We agree with the Seventh Circuit and hold that the Double Jeopardy Clause does not limit the application of collateral estoppel to only cases in which double jeopardy applies."); *Kraushaar v. Flanigan*, 45 F.3d 1040, 1050 (7th Cir. 1995) (discussing the application of collateral estoppel where a state court judge had previously dismissed criminal charges for lack of probable cause).

[133] *See Schuler v. Rainforest Alliance, Inc.,* 684 Fed. App'x 77, 79 (2d Cir. 2017) (affirming decision to defer to Mexican court's prior determination); *Gabbanelli Accordions & Imports, LLC v. Gabbanelli*, 575 F.3d 693, 697 (7th Cir. 2009) ("It is true that American courts apply the American doctrine of res judicata even to a foreign judgment

involved in determining whether the relitigation of a particular issue is likely to be collaterally estopped.

B. "Standard" Two-Stage Collateral Estoppel Analysis

The question of whether collateral estoppel bars relitigation of certain factual disputes requires two analytical steps.

1. *Does the U.S. recognize the foreign judgment?*

In U.S. courts, the Full Faith and Credit Clause of the U.S. Constitution dictates whether a court in one state will recognize the judgment issued in the court of another state.[134] Judgments of foreign nations' courts and tribunals, in contrast, can potentially be recognized domestically under federal law by resorting to the (somewhat "squishy") doctrine of comity—a principle more akin to courtesy than compulsion.[135] Judge Posner, in the recent case of *United States v Kashamu*,[136] summarized the concept of comity as "a doctrine of deference based on respect for the judicial decisions of foreign sovereigns (or of U.S. states, which are quasi-sovereigns)."[137] But commentators, as well as Supreme Court decisions, have criticized the doctrine of comity because of its elusive definition.

Under the doctrine of comity, foreign judgments are entitled to recognition if they:

- Were made upon appropriate notice;
- Presented the opportunity for a full and fair presentation of evidence;
- Were before a foreign court of competent jurisdiction, which operated in a legal system likely to provide for the impartial administration of justice in disputes between the citizens of that foreign nation and other nations; and
- Did not prejudice the litigants' rights as U.S. citizens or otherwise contravene U.S. public policy.[138]

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of a nation like Italy that would not treat an American judgment the same way."). *See also Oneac Corp. v. Raychem Corp.*, 20 F. Supp. 2d 1233, 1242-43 (N.D. Ill. 1998) ("The UK decision itself demonstrates that the issues [sought to be relitigated in U.S. District Court] were actually decided and necessary for the final decision. Lastly, neither this court nor the parties question the fairness of the proceedings in the United Kingdom."); *Northlake Marketing & Supply, Inc. v. Glaverbel SA*, 986 F. Supp. 471, 475-76 (N.D. Ill. 1997) (applying collateral estoppel based on the factual finding of a Belgian court because Belgian procedures were "fundamentally fair" and the accused patent infringer had a full and fair opportunity to litigate the factual issues).

[134] See *Williams v. North Carolina*, 325 U.S. 226, 229 (1945) ("In short, the Full Faith and Credit Clause puts the Constitution behind a judgment, instead of the too fluid, ill-defined concept of 'comity.'").

[135] *See, e.g., Zeevi Holdings, Ltd. v. Republic of Bulgaria,* 494 Fed. App'x 110, 114 (2d Cir. 2012) ("While a domestic court may give preclusive effect to a foreign court's adjudication of a particular issue as a matter of comity, it is not obliged to do so."); *Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("[F]oreign sovereign immunity is a matter of grace and comity."). *See also National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 n.7 (1955) (explaining that foreign sovereign immunity derives from "standards of public morality, fair dealing, reciprocal self-interest, and respect for the power and dignity of the foreign sovereign") (internal quotations omitted).

[136] 656 F.3d 679 (7th Cir. 2011).

[137] *Id.* at 683.

[138] *See Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895) (holding that, where "comity of this nation" calls for recognition of a judgment rendered abroad, "the merits of the case should not … be tried afresh … upon the mere assertion … that the judgment was erroneous in law or in fact"). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106 (1969) ("A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106, cmt. a ("Th[is] rule is …

Conversely, then, reasons for *not* recognizing a foreign judgment include:

- The rendering foreign court lacked jurisdiction;
- The judgment offended U.S. public policy;
- The judgment was tainted by fraud; or
- The judgment prejudiced the rights of U.S. citizen-litigants by failing to accord them due process or to adhere to generally accepted notions of jurisprudence.[139]

Once a litigant has cleared the foreign-judgment-recognition hurdle, the inquiry shifts to whether the scope of the preclusive effect of the foreign judgment is governed by the laws of the rendering foreign state, the U.S., or its states. The Restatement, commentators, and courts have been unable to reach consensus on this question.

2. What is the scope of the judgment's preclusive effect?

The decision concerning which jurisdiction's collateral estoppel rules apply to a foreign judgment is complicated by the fact that the Full Faith and Credit Clause does not compel the outcome. Some courts avoid answering this difficult conflict of laws question altogether, either by finding a perceived conflict or by adopting the parties' choice of law (the latter, for obvious reasons, making this step particularly easy).

a) Minority practice: default to rendering state's issue preclusion law. The minority practice is simply to default to the rendering foreign state's issue preclusion law. Reasons supporting this approach include that it treats the foreign court no differently than one domestic court would treat another domestic court and that it prevents unfair surprises to litigants who formed their expectations based on litigation in a particular legal regime.[140]

b) Majority practice: apply U.S. collateral estoppel rules to the foreign judgment. There are valuable benefits from applying U.S. rules of collateral estoppel to foreign judgments. Applying U.S. issue preclusion rules is administratively easier for U.S. courts and arguably less costly for parties. To the extent that U.S. rules are broader than foreign rules of issue preclusion, moreover, the U.S. rules better advance the underlying rationale for claim and issue preclusion.[141] Finally, application of domestic preclusion rules protects the interests of U.S. citizens, who might have been involuntarily hauled into, and successfully defended against a case filed in, a foreign court.[142]

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applicable to judgments rendered in foreign nations.").

[139] *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481-82 (1987).

[140] *See* Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 70 (1984).

[141] *See* Scott A. Storey, *Mutuality of Collateral Estoppel in Multi-State Litigation: An Evaluation of the Restatement (Second) of Conflict of Laws*, 35 WASH. & LEE L. REV. 993, 1003 (1978).

[142] *See* C*orporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion y Produccion*, 832 F.3d 92, 110 (2d Cir. 2016) (enforcing foreign award because failing to do so would "offend[] basic domestic principles of claim preclusion"); *Alfadda v. Fenn*, 966 F. Supp. 1317, 1329 (S.D.N.Y. 1997) (concluding that a federal court "should normally apply" U.S. federal or state law to decide the scope of the preclusive effect of a foreign judgment, but recognizing additional factors that are particularly relevant to determining the preclusive effect of foreign judgments). *See also Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 32–33 (D.D.C. 2007).

C. The Collateral Estoppel Take-Away

In order to avoid costly collateral estoppel mistakes, practitioners must understand the complex and intricate collateral estoppel principles of the rendering foreign state, and should concurrently evaluate the possible follow-on impact of foreign litigation and any potentially applicable collateral estoppel rules. Regardless of whether a U.S. court follows the minority or prevailing approach to evaluating the collateral estoppel effects of foreign judgments, the practitioner should be prepared to explain precisely how adopting or declining to follow the collateral estoppel principles of a rendering foreign jurisdiction advances the underlying rationales of collateral estoppel, res judicata, comity, and U.S. public policy.

IV. CONCLUSION

The phenomenon of carbon copy prosecutions has arrived and staked a claim in the international anti-corruption enforcement paradigm. A country's incentive to vindicate its own laws is not insubstantial, especially when a company or individual has already admitted, in a foreign proceeding, to violating local law. Accordingly, both named parties and non-parties implicated in a resolution in one country ought to give due consideration to the potential impact of that resolution in another territory, especially in light of recent trends pointing to coordinated multinational cooperation and successive enforcement proceedings. The days of one dimensional government investigations appear to be over for good. Duplicative, serial enforcement actions are now part and parcel of the enforcement landscape, despite a healthy ongoing debate over the need for, and fairness of, serial enforcements. Our continued prediction is that, as globalization makes the world smaller, what we call carbon copy prosecutions will increase in frequency, size, scope, and force.